NOV 13 2003

No. 03-388

IN THE

Supreme Court of the United States

DENNIS BATES; JIMMY BURSON; BENNY JUDAH, doing business as CLEARWATER FARMS; TOMMY COLEMAN; RICHARD COX; WAYNE DAVIS; NEIL FRIESSEN; JAKE FORESE; THOMAS FUSTON; ARTHUR GALVAN, doing business as G-5 PARTNERSHIP; GREG HUGHES; SANDRA and KARL DON HUGHES, doing business as JH CATTLE CO.; RUDY KLASSEN; RONNIE LOVE; KEVIN MATHIS; BRAD PALMER; KIRK PARRISH, doing business as K-L FARMS; JERRY PARRISH; JoEVELYN PATTERSON and DONALD GRUBEN; STACEY PRICE; BENNY JUDAH, doing business as PROGRESSIVE FARMS; MORRIS RUSHING, doing business as PEA-COT FARMS; BILLY SHANNON, FLOYD STOKES; CRAIG WEST; FRENCHIE LEE WHEELER,

Petitioners,

v.

DOW AGROSCIENCES LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

DEAN T. BARNHARD
Counsel of Record
BARNES & THORNBURG
11 South Meridian Street
Indianapolis, Indiana 46204
(317) 236-1313

JOSEPH R. ALBERTS
DOW AGROSCIENCES LLC
9330 Zionsville Road
Building 308-1B
Indianapolis, Indiana 46268
(317) 337-4837

Attorneys for Respondent

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STATEMENT PURSUANT TO RULE 29.6

Dow AgroSciences LLC is a wholly owned subsidiary of The Dow Chemical Company.

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STATEMENT OF THE CASE

I. Introduction

Respondent Dow AgroSciences LLC ("Dow AgroSciences") respectfully requests that the Petition be denied because, first, there is no legitimate, meaningful split in authority over FIFRA preemption. Following *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), nine federal circuits, and the supreme courts and/or intermediate appellate courts of twenty-seven states, have all agreed that 7 U.S.C. § 136v(b) expressly preempts common law challenges to EPA-accepted pesticide product labels. In addition, one state supreme court (Texas') and one federal circuit (the Third) generally agree, but hold that FIFRA preemption depends upon factually-sensitive timing and intensity of EPA scrutiny of the data underlying the challenged aspect of a particular pesticide's label or packaging. Only one state supreme court (Montana's, over a strong dissent by its now-Chief Justice) and only one state's intermediate appellate court (Oregon's) have disagreed.[1]

Second, Petitioners' arguments for reversal here, relying upon the regulation-dependent analysis accepted in Texas and the Third Circuit, are ultimately futile. Such an exception to preemption simply does not apply to the specific facts of this case because Dow AgroSciences, in applying for the federal registration of its Strongarm herbicide, submitted a massive amount of efficacy and crop safety data to the EPA for its consideration.

Third, the Montana and Oregon decisions do not create a legitimate, meaningful conflict. Indeed, the decision by the Montana court is immediately suspect because it is premised entirely upon arguments offered in a widely-rejected and otherwise-unsuccessful government *amicus* brief that the United States Solicitor General has now expressly and categorically repudiated in a recent *amicus* brief to this Court. The decision by the Oregon court is equally suspect because it wholly misinterprets this Court's decision in *Medtronic, Inc. v.*

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1. The issue of FIFRA preemption has not reached the remaining two regional federal circuits, the District of Columbia Circuit, or the appellate courts of the remaining twenty-three states since *Cipollone*.

Lohr, 518 U.S. 470 (1996), reaching a conclusion contradicted by not less than twenty-two published FIFRA decisions directly holding that *Medtronic* does not alter the FIFRA preemption analysis.

II. Statement Of The Facts

In 1992, Dow AgroSciences began the lengthy application process for federal registration of its new diclosulam-based herbicide, later named Strongarm. As required by the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y, and its implementing regulations, Dow AgroSciences submitted massive amounts of product data to the United States Environmental Protection Agency ("EPA") in support of its application.

Because Strongarm's application for registration was submitted under the 1996 amendments to FIFRA, specifically 7 U.S.C. § 136a(c)(10) (authorizing the Reduced Risk Initiative implemented by the EPA through PESTICIDE REGULATION NOTICE 97-3 (Sept. 4, 1997)), Dow AgroSciences submitted a comprehensive body of data on Strongarm's efficacy in controlling broadleaf weeds in peanuts and its safety for that use. The EPA's final rule authorizing registration of diclosulam, Strongarm's active ingredient, proves that the EPA required and considered such data for Strongarm: "The petitioner has proposed the following plantback restrictions . . . 9 months for . . . *peanuts* . . . *due to phytotoxicity*." 65 Fed. Reg. 12129, 12133 (March 8, 2000) (emphasis added). The EPA's consideration of soil pH factors as influencing crop safety specifically is proven by the EPA's approval of this warning for Strongarm's label:

> ***Note:*** *Environmental and soil factors can influence the performance and selectivity of any herbicide treatment. . . . factors such as pH. . . can contribute to reduced crop tolerance to a soil-applied herbicide.*

(italics original, emphasis added).

Strongarm's federal registration ultimately issued on March 8, 2000, pursuant to 7 U.S.C. § 136a(c)(7)(A).[2]

2. The Texas Department of Agriculture had such great expectations for the benefits of Strongarm's use on Texas peanut crops that, prior to Strongarm's federal registration, it petitioned the EPA for an emergency exemption under 7 U.S.C. § 136p to permit the use of Strongarm to treat up to 184,000 acres of Texas peanuts. *See* 64 Fed. Reg. 9152 (Feb. 24, 1999).

Dow AgroSciences has sold Strongarm only with its EPA-accepted label attached to the containers of the product. Petitioners purchased Strongarm from their respective local agricultural chemical suppliers and applied it to their year 2000 peanut crops.

Petitioners misstate the facts when they argue that "Strongarm . . . was the only herbicide applied to the farmers' crops in the 2000 growing season." Pet. at 2. In fact, the great majority of the Petitioners used at least one other herbicide, and several of them used three or more different herbicides in addition to Strongarm on their 2000 peanut crops.

Petitioners further misstate the facts by arguing "[p]retrial discovery indicated that Strongarm causes injury to peanut roots in soils with pH levels of 7.0 or greater, and that before the herbicide's release, Dow was aware of the harmful effect of applying Strongarm to peanuts grown in the high pH-level soils of Texas, New Mexico and Oklahoma." *Id.* First, no pre-trial discovery was undertaken in this case, the District Court decided Dow AgroSciences' motion for summary judgment before discovery commenced.[3] Second, there is no evidence in this record to support Petitioners' accusation.

Due to extremes in weather, the year 2000 was a challenging one for all West Texas agribusinesses, including these Petitioners. Petitioners concluded, however, that Strongarm was to blame for their disappointing crop yields and threatened to sue Dow AgroSciences in multiple, separate lawsuits to be filed in several different Texas county courts. Rather than defend itself in such multiple state court proceedings, Dow AgroSciences filed a declaratory judgment action in the federal District Court most geographically convenient to the Petitioners. One month later, Petitioners filed suit against Dow AgroSciences in ten different Texas county courts, joining non-diverse Texas defendants, exactly as they had threatened to do.

The District Court denied Petitioners' motion to dismiss or to abstain from deciding Dow AgroSciences' declaratory

3. The Petitioners did not move the District Court to delay its ruling on Dow AgroSciences' motion to permit them to take discovery pursuant to Rule 56(f) of the Federal Rules of Civil Procedure.

judgment action. *See Dow AgroSciences LLC v. Bates*, NO. CIV. A. 5:01-CV-331-C, 2002 WL 1205133 (N.D. Tex. March 12, 2002).[4] The District Court then granted summary judgment against Petitioners on their counterclaims, holding almost all of them to be FIFRA-preempted, and the remainder of them barred by the limitation of remedies provision on the Strongarm label and its effective disclaimer of express and implied warranties. 205 F. Supp. 2d 623. The Fifth Circuit affirmed, but held that FIFRA preempted all of the Petitioners' claims. 332 F.3d 323. Petitioners waived appellate review of the District Court's holding on the limitation of remedies on Strongarm's label. 332 F.3d at 332 n.15.

Following the Fifth Circuit's affirmance, several of the Petitioners resumed active prosecution of their parallel state court actions. On October 14, 2003, however, the District Court enjoined the Petitioners from further prosecution of their state law actions and Petitioners have appealed that injunction to the Fifth Circuit.

REASONS FOR DENYING THE PETITION

I. The Particular Facts Of This Case Make It An Exceedingly Poor Candidate For Review.

A. Even If The Texas Supreme Court's Interpretation Of FIFRA Preemption Were Adopted Over The Fifth Circuit's Interpretation, Petitioners' Claims Would Still Be Preempted Because The "Exception To Preemption" Created In *Geye* Does Not Apply To These Facts.

Petitioners are wrong to argue that review is required because their label-related claims would have survived FIFRA preemption under the Texas Supreme Court's decision in *Am. Cyanamid Co. v. Geye*, 79 S.W.3d 21 (Tex. 2002), *cert. denied*, 123 S. Ct. 2637 (2003). The Texas court held in *Geye* that the claims presented there were not FIFRA-preempted because "[t]he EPA did not evaluate whether the tank-mixed Pursuit-Prowl combination had a toxic effect on peanut plants." *Id.* at 26. The *Geye* court held: "[T]he scope of FIFRA's preemption is dependent on what the EPA regulates, . . ."

4. Petitioners do not seek review of the Fifth Circuit's holding that the District Court did not abuse its discretion in this regard.

Id. at 29. *Contra Bates*, 332 F.3d at 330 ("Nowhere in FIFRA's text is § 136v(b)'s express preemptive command . . . linked to the interplay of EPA regulations."). *See also id.* at 331 ("FIFRA's express preemption clause is self-executing."). Because of the facts of this particular case, however, the analytical disagreement between *Geye* and *Bates* is irrelevant.

Unlike the older herbicides at issue in *Geye*, Strongarm's application for registration under the EPA's new procedures established by the Reduced Risk Initiative required Dow AgroSciences to submit a comprehensive body of data on Strongarm's efficacy and safety for use on peanut crops. The EPA considered that data and approved a label warning specifically addressing soil pH factors as affecting crop safety. Whether those warnings were adequate and sufficient in Petitioners' view does not change the fact that the EPA affirmatively exercised its regulatory authority on precisely the issues Petitioners challenge. The "exception to preemption" created in *Geye*, therefore, simply does not apply to the facts of this particular case.

B. Petitioners' Claims Are All Label-Based Because Their Other Claims All Failed As A Matter Of Texas State Law.

Petitioners are wrong to argue that review is required because of allegedly differing analyses employed by the courts when determining whether a state-law claim is merely a disguised (hence preempted) challenge to a product label. Pet. at 19-27. Petitioners argue that their pleading of an extravagant variety of claims supports the necessity of review. This Court, however, commands that the preemptive force of federal statutes may not be evaded by mere pleading tactics. *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 324 (1981) ("[C]ompliance with the [pre-emptive] intent of Congress cannot be avoided by mere artful pleading."). More important, Petitioners' failure to offer proof on essential elements of their state-law claims proves, by process of elimination, that all their claims were label-based and that, therefore, their lengthy discussion of differing "tests" for preemption is irrelevant. Petitioners' default on this point results in a waiver of the arguments they make to this Court.

Petitioners did not offer proof that there was a safer, feasible alternative design for Strongarm's chemical composition. Accordingly, all their claims for negligent development, manufacturing and design, design-defect strict liability, and breach of implied warranty failed as a matter of black-letter Texas state substantive law. *Am. Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420, 437 (Tex. 1997). *See also id.* at 433 n.9; *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 335 n.4 (Tex. 1998) (citing *Caterpillar, Inc. v. Shears*, 911 S.W.2d 379, 384 (Tex. 1995)), *cert. denied*, 526 U.S. 1040 (1999); *Smith v. Louisville Ladder Corp.*, 237 F.3d 515, 521 (5th Cir.), *reh'g en banc denied*, 250 F.3d 745 (5th Cir. 2001) ("[B]ecause [Petitioners] failed to establish a safer alternative design for [Strongarm], [their] claim predicated on breach of implied warranty must fail, along with [their] design defect claim.").

Petitioners' failure to offer evidence of a safer, feasible alternative design, moreover, apparently drives their misrepresentation of a key holding in *Bates* by a cautious omission of important language immediately preceding and surrounding the snippet they pretend accurately to quote. Petitioners accuse the Fifth Circuit of dramatically expanding doctrinaire FIFRA jurisprudence, "stating that the claims were preempted because they would have the 'undeniable practical effect' of inducing a manufacturer to alter the product *or* label to avoid liability.'" Pet. at 26 (citing 332 F.3d at 329 n.9 (Petitioners' emphasis). *See also id.* at 27 (same). What the Fifth Circuit really said was that "*different* requirements may be imposed" when success on a common law claim induces a manufacturer "to alter the product or label to avoid liability" (332 F.3d at 329 n.9 (emphasis added)) and that "the farmers' claims are expressly preempted under § 136v(b) if a judgment against Dow would induce it to alter its product *label*." *Id.* at 331 (citation omitted, emphasis added).

II. This Court Has Strongly Indicated, And Nine Federal Circuits And The Courts Of Twenty-seven States Have Held, That FIFRA Expressly Preempts All Claims That Challenge A Product's EPA-Accepted Label.

A. The Text Of FIFRA § 136v(b) And Its Legislative History Confirm Congress' Preemptive Intent.

Congress enacted FIFRA in 1947, and amended it in 1972 to significantly strengthen its registration and labeling standards. *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 601 (1991). The 1972 amendments ensured that FIFRA regulated the use, sale and labeling of pesticides; and that it regulated pesticides produced and sold in both intrastate and interstate commerce. *Id.* Those amendments also granted increased enforcement authority to the EPA. *Id.* In short, the 1972 amendments "'transformed FIFRA from a labeling law into a comprehensive regulatory statute.'" *Id.* (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984)).

To accomplish one principal objective of FIFRA, achieving "uniformity of labeling across the nation" (*Papas v. Upjohn Co.*, 926 F.2d 1019, 1025 (11th Cir. 1991) ("*Papas I*"), *aff'd after remand*, 985 F.2d 516 (11th Cir.) ("*Papas II*"), *cert. denied sub nom. Papas v. Zoecon Corp.*, 510 U.S. 913 (1993), Congress expressly preempted all state authority regarding pesticide labeling and packaging through 7 U.S.C. § 136v(b), entitled "Uniformity": "[A] state shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." [5]

Given the textual clarity of § 136v(b), resort to FIFRA's legislative history is not necessary. That legislative history, however, confirms Congress' preemptive intent with equal and exquisite clarity: "[T]he Committee has adopted language which is intended *to completely preempt State authority in regard to labeling* and packaging." H.R. REP. No. 92-511, at 16 (1971) (emphasis added). *See also id.* at 1-2 ("State authority to change Federal labeling and packaging is *completely preempted*.") (emphasis added); S. REP. No. 92-838, pt. 1, at 30 (1972), *reprinted*

5. The section title "Uniformity" was added through a 1988 amendment, thereby reinforcing Congress' original preemptive intent. *Papas I*, 926 F.2d at 1025.

in 1972 U.S.C.C.A.N. 3993, 4021 ("Subsection (b) *preempts any* State labeling or packaging requirements differing from such requirements under the Act") (emphasis added). Importantly, the preemption provisions which ultimately became § 136v(b) were *identical* in both the House and Senate versions of H.R. 10729. *Compare* H.R. 10729, 92d Cong. § 24(b) (1971) (House bill) *with* H.R. 10729, 92d Cong. § 23(b) (1972) (Senate version as amended). Remarkably, Petitioners neglect these dispositive expressions of preemptive intent in their discussion of FIFRA's legislative history (Pet. at 8-11), but the courts have not. *See MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1025 n.3 (5th Cir. 1994), *aff'd after remand*, 68 F.3d 470 (5th Cir. 1995) (mem.); *King v. E.I. DuPont de Nemours & Co.*, 996 F.2d 1346, 1349-50 (1st Cir. 1993); *Papas I*, 926 F.2d at 1023.[6]

B. This Court Recognized § 136v(b)'s Preemptive Effect In *Mortier*.

In *Mortier*, this Court construed FIFRA § 136v(a), and held that its preservation of state power to "regulate the sale or use of any federally registered pesticide or device in the State," did not preclude political subdivisions of such states from exercising that power through positive enactments of law.[7]

6. Petitioners do not just ignore this aspect of FIFRA's legislative history, they go much further by affirmatively misrepresenting it. *See* Section IIC.

7. At least thirty-five States (including Texas), however, have prohibited entirely or restricted severely the regulation of pesticides by their respective local political subdivisions. *See, e.g.*, ALA. CODE. § 2-27-5.1 (2003); ARIZ. REV. STAT. § 3-337 (2003); CAL. FOOD & AGRIC. CODE § 11501.1 (Deering 2003); COLO. REV. STAT. § 35-9-105 (2003); FLA. STAT. ch. 482.242 (2003); GA. CODE ANN. § 2-7-113.1 (2002); IDAHO CODE § 22-3426 (2003); 415 ILL. COMP. STAT. 60/3 (2003); IOWA CODE § 206.34 (2003); KAN. STAT. ANN. § 2-2480 (2002); KY. REV. STAT. ANN. § 217B.270 (Michie 2002); LA. REV. STAT. ANN. § 3:3224 (Michie 2003); MICH. COMP. LAWS § 324.8328 (2003); MINN. STAT. § 18B.02 (2002); MISS. CODE ANN. § 69-23-9 (2003); MO. REV. STAT. § 281.005 (2003); MONT. CODE ANN. § 80-8-120 (2002); NEB. REV. STAT. § 2-2625 (2002); NEV. REV. STAT. § 586.230 (2003); N.H. REV. STAT. ANN. § 430:49 (2002); N.M. STAT. ANN. § 76-4-9.1 (Michie 2003); N.Y. ENVTL. CONSERV. LAW § 33-0303 (Consol. 2003); N.C. GEN. STAT. § 143-465 (2003); N.D. CENT. CODE § 4-35-06.1 (2003); OHIO REV. CODE ANN. § 921.23(C) (Anderson 2003); OKLA. STAT. tit. 2, § 3-85 (2002); OR. REV. STAT. § 634.057 (2001); 3 PA. CONS. STAT. § 111.57 (2003); S.C. CODE ANN. § 46-13-30 (Law. Co-op. 2002); (Cont'd)

While the construction of § 136v(a) was the *Mortier* Court's central focus, it also addressed the preemptive effect of § 136v(b) in the context of pesticide labeling and packaging. This Court, employing a pre-*Cipollone* implied field preemption analysis, declared that state law was "impliedly usurped" in the area of pesticide labeling and packaging and that pesticide "labeling . . . fall[s] within an area that FIFRA's 'program' pre-empts." 501 U.S. at 614-15. *See also id.* at 613. Indeed, the United States Solicitor General strongly urged this Court to so hold:

> To be sure, an exclusively federal approach is necessary in certain areas of pesticide regulation. One such area is labeling. Due to the burden on commerce that would be imposed by different labeling requirements in states and localities across the country, *Congress clearly preempted all but federal regulation of labels*. Sec. 7 U.S.C. § 136v(b).

Brief for United States as *Amicus Curiae*, at 22, *Mortier*, 501 U.S. 597 (No. 89-105).[8]

Petitioners studiously ignore *Mortier*'s instructions on the preemptive effect of § 136v(b), but, again, the courts have not. The Seventh and Tenth Circuits, for instance, read *Mortier's* teachings to mandate preemption: "The Supreme Court recently noted the *absolutist* nature of FIFRA's pre-emption in the labeling and packaging context. . . ." *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 370 (7th Cir. 1993) (emphasis added); *Arkansas-Platte & Gulf P'ship v. VanWaters & Rogers, Inc.*, 959 F.2d 158, 164 (10th Cir. 1992) ("*Arkansas-Platte I*") (finding preemption and holding: "We base our holding on the language of § 136v . . . and our understanding of the Supreme Court's construction of FIFRA in *Mortier*."), *aff'd after remand*, 981 F.2d 1177 (10th Cir.) ("*Arkansas-Platte II*"), *cert. denied sub*

(Cont'd)
TENN. CODE ANN. § 43-8-114 (2003); TEX. AGRIC. CODE ANN. § 76.101 (Vernon 2003); VT. STAT. ANN. tit. 6, § 917 (2003); W. VA. CODE § 19-16A-2 (2003); WIS. STAT. § 94.701 (2002).

8. The Solicitor General recently reaffirmed the United States' formal position that § 136v(b) expressly preempts state common law in its *amicus* brief filed before this Court in *Am. Cyanamid Co. v. Geye*, 79 S.W.3d 21 (Tex. 2002), *cert. denied*, 123 S.Ct. 2637 (2003). *See* Section II I.

nom. Arkansas-Platte & Gulf P'ship v. Dow Chem. Co., 510 U.S. 813 (1993). *See also Hue v. Farmboy Spray Co., Inc.*, 896 P.2d 682, 691 (Wash. 1995) ("*The United States Supreme Court*, seven federal courts of appeal, dozens of district courts and state courts all concur: in preempting state labeling 'requirements,' Congress intended to preempt both direct labeling regulations and common law labeling duties enforced through damages actions.") (emphasis added).

C. Petitioners Mischaracterize FIFRA's Legislative History And *Mortier*.

Petitioners argue that FIFRA's legislative history demonstrates that Congress did not intend to preempt state tort law because the EPA's former General Counsel, John Quarles, testified regarding an early draft of a proposed amendment in 1971 that it "does not affect tort liability." Pet. at 9. This is a grave mischaracterization of what actually occurred.

First, the bill about which Mr. Quarles was testifying, H.R. 4152 (introduced February 10, 1971), did not even contain a preemption provision. It was a later House bill, H.R. 10729 (introduced on September 16, 1971), that contained a preemption provision. H.R. 10729, 92d Cong. § 24(b) (1971). *Second*, Mr. Quarles' testimony addressed a hypothetical tort action between two farmers for crop damage due to misapplication of a pesticide and had nothing to do with preemption of state law challenges to EPA-approved labeling. *See Federal Pesticide Control Act of 1971: Hearings Before the House Committee on Agriculture*, 92d Cong. 8, at 42 (1971). Petitioners' mischaracterization of Mr. Quarles' testimony is misleading and disingenuous and they compound their errors by mischaracterizing this Court's discussion of FIFRA's legislative history in *Mortier*.

Not only do Petitioners pretend away *Mortier*'s endorsement of § 136v(b)'s preemptive effect (501 U.S. at 614-15), they materially misrepresent *Mortier*'s holdings, arguing: "As noted by this Court, the Committee Reports underlying FIFRA's preemption clause are contradictory at

best. *Mortier*, 501 U.S. at 609-10." Pet. at 10.[9] The legislative histories the *Mortier* Court was discussing, however, were the antecedents of § 136v(a), not the legislative history of § 136v(b). The issue discussed, moreover, was not the preemptive effect of § 136v(b), but whether § 136v(a) preempted regulatory action by political subdivisions of states through positive enactments of law.

Petitioners' discussion of the legislative history that they pretend relates to § 136v(b), but which in truth relates to § 136v(a), is further misleading because the legislative history they discuss relates only to FIFRA's well-established and comprehensive regulatory partnership between the federal government and the states' respective administrative and executive agencies. *See* Pet. at 9-10. To accommodate "regional and local factors like climate, population, geography, and water supply" (501 U.S. at 614), "FIFRA implies a regulatory partnership between federal, state *and* local governments." *Id.* at 615 (original emphasis). *See also id.* at 601-02. Each of the states, and the District of Columbia, has joined this comprehensive federal/state regulatory partnership by enacting their own regulatory regimes to govern the sale and use of pesticide products within their own borders, but the limitations of space do not permit a comprehensive citation to each of them on this point.

This massive body of state legislative action confirms that Congress' use of the terms "regulate" and "regulation" in § 136v(a)'s preservation of state authority over pesticide sales and use detracts in no way from the federal preemption of state law "requirements," as used in § 136v(b), with respect to EPA-approved labeling.

> Read against the backdrop of regulatory activity undertaken by state legislatures and federal agencies in response to [the enactment of FIFRA], the term "regulation" most naturally refers to positive enactments by those bodies, not to common-law damages actions.

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9. Petitioners' statement here is demonstrably false because the preemption provisions that ultimately became § 136v(b) were identical in both the House and Senate versions of H.R. 10729. *See* Section IIA.

Cipollone, 505 U.S. at 519. It follows from *Mortier* and *Cipollone*, therefore, that the terms "regulate" and "regulation" in § 136v(a)'s preservation of state authority "to regulate the sale or use of" pesticides through "regulation" mean positive enactments of law and administrative agency action, not state "regulation" of pesticide labeling through imposing state "requirements for labeling . . . in addition to or different from those required under" FIFRA, either through positive enactments of law or common law tort actions, the domain expressly preempted by § 136v(b). Otherwise, the enactment of § 136v(b) "would have been doubly superfluous given FIFRA's historic focus on labeling to begin with." *Mortier*, 501 U.S. at 613 (citation omitted). *E.g., Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 454 (2002) ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.") (internal quotation marks and citation omitted); *United States v. Locke*, 529 U.S. 89, 106 (2000) ("We decline to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law.") (citations omitted).

D. This Court Has Indicated That Its Enforcement Of The Self-Executing Express Preemption Clause Of The 1969 Cigarette Act In *Cipollone* Drives The FIFRA Preemption Analysis.

In *Cipollone*, decided the next term after *Mortier*, the Court construed § 5(b) of the 1965 Federal Cigarette Labeling and Advertising Act (the "1965 Cigarette Act"), and its successor, § 5(b) of the Public Health Cigarette Smoking Act of 1969 (the "1969 Cigarette Act").[10] Writing for the plurality, Justice Stevens concluded that the text of the 1969 Act mandated express preemption of state law failure to warn claims and that there was "no cause to look beyond" that text. 505 U.S. at

10. Section 5(b) of the 1969 Cigarette Act provides: "(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Chapter." 15 U.S.C. § 1334(b).

517 (Stevens, J.). Justice Blackmun agreed "that the preemptive scope of the Federal Cigarette [Acts] is 'governed entirely by the express language' of the statutes' pre-emption provisions. *Ante*, 505 U.S. at 517." 505 U.S. at 531-32 (Blackmun, J.).[11] Justice Scalia separately wrote, "The proper rule of construction for express preemption provisions is, it seems to me, the one that is customary for statutory provisions in general: Their language should be given its ordinary meaning." 505 U.S. at 548 (citations omitted) (Scalia J.). Justices Scalia and Thomas read the preemptive effect of these statutes more broadly than Justice Stevens and "believe[d] petitioner's failure-to-warn claims [were] preempted by the 1965 Act, and *all* his common-law claims by the 1969 Act." *Id.* (emphasis added).

The key distinction between the preemption clauses in the 1965 and 1969 Acts, as the *Cipollone* plurality emphasized, was that the term "requirement," as Congress used it in the 1969 Act (and in § 136v(b)), is broader than the term "regulation." *See* 505 U.S. at 520-21 & n.19 (the 1969 Cigarette Act's preemption clause, which bars "'requirement[s] or prohibition[s] . . . imposed under State law,'" is "much broader" than its predecessor in the 1965 version of the statute, which was "concerned primarily with 'regulations' – positive enactments, rather than common-law damages actions"). For that reason, the majority of the Court agreed that Congressional preemption of state law requirements in the 1969 Cigarette Act "easily" preempted common law failure to warn claims.

Six Justices, therefore, held the express preemption clause of the 1969 Cigarette Act to be automatic and self-executing, even though the Act "allow[ed] the FTC to regulate print advertising" (505 U.S. at 520; *see also id.* at 541-42), much as FIFRA allows the EPA to regulate pesticide labeling. *See* 40 C.F.R. Part 156 (2003). And a unanimous Supreme Court "held that as long as a federal statute contains an express preemption clause, it is wholly unnecessary and inappropriate to import notions of implied preemption through conflict [let alone conflict with underlying agency regulatory action] into

11. Justice Blackmun's disagreement was with the majority's holdings that the term "'State law' as used in § 5(b)" of the 1969 Act included state common law. 505 U.S. at 535.

the express preemption analysis." *Bates*, 332 F.3d at 329-30 (construing *Cipollone*, footnotes omitted). *See* 505 U.S. at 517 ("[T]he other provisions of the 1965 and 1969 Acts offer no cause to look beyond § 5 of each Act.").

Thus, as this Court later explained in *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869-74 (2000), implied conflict preemption principles arising from regulatory action by federal agencies may provide *additional* bases for federal preemption, compel preemption more *broadly* than the terms of an express preemption clause, or *trump* a statutory savings clause; but an express preemption clause stands on its own legs and does not need the importation of implied conflict principles to support it. *E.g., Nathan Kimmel, Inc. v. DowElanco*, 275 F.3d 1199, 1204 (9th Cir. 2002) (FIFRA's underlying regulatory structure provides reasons for preemption under ordinary conflicts principles in addition to and beyond § 136v(b)'s express preemptive mandate).[12]

Shortly after deciding *Cipollone*, this Court vacated the implied FIFRA preemption decisions in *Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991) ("*Papas I*") and *Arkansas-Platte & Gulf P'ship v. Van Waters & Rogers, Inc.*, 959 F.2d 158 (10th Cir. 1992) ("*Arkansas-Platte I*"), and "remanded [them] . . . for further consideration in light of *Cipollone*." *Papas v. Zoecon Corp.*, 505 U.S. 1215 (1992); *Arkansas-Platte & Gulf P'ship v. Dow Chem. Co.*, 506 U.S. 910 (1992). Thus, "[t]he Supreme Court itself has indicated that *Cipollone* applies to FIFRA preemption determinations." *King v. E.I. DuPont de Nemours & Co.*, 996 F.2d 1346, 1349 (1st Cir. 1993); *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555, 559 (9th Cir. 1995) (same).

On remand in *Papas II*, the Eleventh Circuit compared § 136v(b) with § 5(b) of the 1969 Cigarette Act and squarely

12. This was the sole point of disagreement between the Fifth Circuit's decision below and the Texas Supreme Court's decision in *Am. Cyanamid Co. v. Geye*, 79 S.W.3d 21 (Tex. 2002), *cert. denied*, 123 S.Ct. 2637 (2003). *Compare Bates*, 332 F.3d at 330 ("Nowhere in FIFRA's text is § 136v(b)'s express preemptive command . . . linked to the interplay of EPA regulations."); *see also id.* at 331 ("FIFRA's express preemption clause is self-executing."), *with Geye*, 79 S.W.3d at 29 ("[T]he scope of FIFRA's preemption is dependent on what the EPA regulates, . . ."). Because of the facts of this particular case, however, this analytical disagreement is irrelevant.

held that "the *Cipollone* opinion dictates, under an express preemption analysis, the same result we reached earlier under the implied preemption doctrine." *Papas II*, 985 F.2d at 518 (citing *Papas I*, 926 F.2d at 1026). The Tenth Circuit on remand also affirmed *Arkansas-Platte I*, and in accordance with *Cipollone's* teachings, focused on the precise text of § 136v(b) in concluding that it mandated express preemption. *Arkansas-Platte II*, 981 F.2d at 1179 ("We believe Congress circumscribed the area of labeling and packaging and preserved it only for federal law. With the same stroke, Congress banned any form of state regulation. . . .") (citing *Cipollone*, 112 S.Ct. at 2618). "Although the words employed in § 136v(b) of FIFRA are different from those in § 5(b) of the Cigarette Smoking Act, their effect is the same. . . . We see no difference between the operative effect of the two acts." *Id.* at 1179. The Seventh Circuit "discern[ed] no significant distinction at all" holding, "[n]ot even the most dedicated hair splitter could distinguish these statements." *Shaw*, 994 F.2d at 371. *See also Taylor AG*, 54 F.3d at 559; *King*, 996 F.2d at 1349. *MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1024 (5th Cir. 1994) ("Applying the reasoning articulated in *Cipollone* to FIFRA and the case at hand, the conclusion is manifest: FIFRA preempts conflicting state common law concerning the improper labeling of herbicides, which is the only common law claim raised in this appeal."), *aff'd after remand*, 68 F.3d 470 (5th Cir. 1995) (mem.).

E. Petitioners Wildly Exaggerate Their Argument That "FIFRA Has Pitted Federal Judges Against State Judges."

Since *Cipollone*, there is broad agreement that the language of § 136v(b) "manifestly ordains the preemption of the establishment or enforcement of any common law duty that would impose a labeling requirement inconsistent with those established by FIFRA." *Worm v. Am. Cyanamid Co.*, 5 F.3d 744, 747 (4th Cir. 1993) ("*Worm II*") (citation and internal quotation marks omitted). Following *Cipollone*, each of the nine federal Circuits to address the issue, through at least twenty-two decisions, has easily concluded that FIFRA expressly preempts

common law challenges to the adequacy and sufficiency of pesticide labeling.[13]

Petitioners simply misstate the law by making their wildly exaggerated claim that "the confusion surrounding FIFRA has pitted federal judges against state judges." Pet. at 4. *See also id.* at 6 (decrying "the maze of conflicting case law."); *id.* ("[T]hroughout this time of confusion, FIFRA's goals of uniformity and protection of health are eviscerated."[14]); *id.* at 19 ("[F]ederal and state judges are pitted against each other in the battle over the viability of state law tort claims in pesticide-related cases.").

The true facts are these: the Supreme Courts of eighteen states, in at least twenty-five published decisions, have confirmed the fundamental rule of FIFRA preemption.[15] In an

13. *E.g., Bates*, 332 F.3d 323; *Lowe's Home Centers, Inc. v. Olin Corp.*, 313 F.3d 1307 (11th Cir. 2002), *reh'g and reh'g en banc denied*, 61 Fed. Appx. 673 (11th Cir. 2003) (table); *Netland v. Hess & Clark, Inc.*, 284 F.3d 895 (8th Cir.), *cert. denied*, 123 S.Ct. 415 (2002); *Nathan Kimmel*, 275 F.3d 1199; *Ruiz-Guzman v. Amvac Chem. Corp.*, No. 98-35088, 243 F.3d 549, 2000 WL 1763212 (9th Cir. Nov. 28, 2000); *Andrus v. AgrEvo USA Co.*, 178 F.3d 395 (5th Cir. 1999); *Hawkins v. Leslie's Pool Mart, Inc.*, 184 F.3d 244 (3d Cir. 1999); *Lescs v. William R. Hughes, Inc.*, No. 97-2278, 168 F.3d 482, 1999 WL 12913 (4th Cir. Jan. 14, 1999), *cert. denied*, 528 U.S. 1119 (2000); *Nat'l Bank of Commerce (Arnold) v. Dow Chem. Co.*, 165 F.3d 602 (8th Cir. 1999); *Kuiper v. Am. Cyanamid Co.*, 131 F.3d 656 (7th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998); *Rodriguez v. Am. Cyanamid Co.*, No. 96-15752, 116 F.3d 485, 1997 WL 306430 (9th Cir. June 5, 1997); *Grenier v. Vt. Log Bldgs., Inc.*, 96 F.3d 559 (1st Cir. 1996); *Welchert v. Am. Cyanamid, Inc.*, 59 F.3d 69 (8th Cir. 1995); *Taylor AG*, 54 F.3d 555; *Lowe v. Sporicidin Int'l*, 47 F.3d 124 (4th Cir. 1995); *Bice v. Leslie's Poolmart, Inc.*, 39 F.3d 887 (8th Cir. 1994); *MacDonald*, 27 F.3d 1021; *Worm II*, 5 F.3d 744; *King*, 996 F.2d 1346; *Shaw*, 994 F.2d 364; *Papas II*, 985 F.2d 516; *Arkansas-Platte II*, 981 F.2d 1177.

14. Petitioners do not explain, because they cannot explain, why allowing their common law challenges to Strongarm's EPA-approved label in a crop damage case would promote rather than "eviscerate" "FIFRA's goals of uniformity and protection of health." Common law litigation over EPA-approved product labeling would destroy FIFRA's goals of achieving national uniformity in pesticide labeling and common law litigation over crop damage cases has nothing to do with the protection of health.

15. *Etcheverry v. Tri-Ag Service, Inc.*, 993 P.2d 366, 373 (Cal. 2000); *Banks v. ICI Americas, Inc.*, 450 S.E.2d 671, 676 (Ga. 1994); *Kawamata Farms, Inc. v. United Agri Prods.*, 948 P.2d 1055, 1074 (Haw. 1997); *Dow Chem. Co. v.*

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additional nine states where the issue has not yet reached their respective state Supreme Courts, intermediate state courts of appeal have also confirmed the fundamental rule of FIFRA preemption.[16] Based on the particular facts of this case, therefore, nine federal Circuits and twenty-seven states

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Ebling, 753 N.E.2d 633, 635-36 (Ind. 2001); *Wright v. Am. Cyanamid Co.*, 599 N.W.2d 668, 671 (Iowa 1999); *Ackerman v. Am. Cyanamid Co.*, 586 N.W.2d 208, 213-14 (Iowa 1998); *Ackles v. Luttrell*, 561 N.W.2d 573, 579-80 (Iowa 1997); *Schuver v. E.I. Du Pont de Nemours & Co.*, 546 N.W.2d 610, 615-16 (Iowa 1996); *Clubine v. Am. Cyanamid Co.*, 534 N.W.2d 385, 387-88 (Iowa 1996); *Jenkins v. Amchem Prods., Inc.*, 886 P.2d 869, 879 (Kan. 1994), *cert. denied*, 516 U.S. 820 (1995); *Hopkins v. Am. Cyanamid Co.*, 666 So. 2d 615, 621 (La. 1996); *Hochberg v. Zoecon Corp.*, 657 N.E.2d 1263, 1266 (Mass. 1995); *Goeb v. Tharaldson*, 615 N.W.2d 800, 817 (Minn. 2000); *Eyl v. Ciba-Geigy Corp.*, 650 N.W.2d 744, 759-60 (Neb. 2002), *cert. denied*, 123 S. Ct. 2646 (2003); *Pfeifer v. E.I. Du Pont de Nemours & Co.*, 606 N.W.2d 773, 778 (Neb. 2000); *Davidson v. Velsicol Chem. Corp.*, 834 P.2d 931, 934 (Nev. 1992), *cert. denied*, 507 U.S. 1051 (1993); *Lewis v. Am. Cyanamid Co.*, 715 A.2d 967, 971 (N.J. 1998); *DiPetrillo v. Dow Chem. Co.*, 729 A.2d 677, 682 (R.I. 1999); *Eide v. E.I. Du Pont de Nemours & Co.*, 542 N.W.2d 769, 772 (S.D. 1996); *Quest Chem. Corp. v. Elam*, 898 S.W.2d 819, 820-21 (Tex. 1995); *Goodwin v. Bacon*, 896 P.2d 673, 678-81 (Wash. 1995); *All-Pure Chem. Co. v. White*, 896 P.2d 697, 703-04 (Wash. 1995); *Hue v. Farmboy Spray Co., Inc.*, 896 P.2d 682, 894-95 (Wash. 1995); *Gorton v. Am. Cyanamid Co.*, 533 N.W.2d 746, 753 (Wis. 1995), *cert. denied*, 516 U.S. 1067 (1996). The Hawaii and Idaho Supreme Courts agree with FIFRA preemption generally, but hold that it extends only to label statements required by the EPA, not to voluntary label statements. *See Walker v. Am. Cyanamid Co.*, 948 P.2d 1123, 1128 (Idaho 1997); *Kawamata Farms*, 948 P.2d at 1080. *But see Sleath v. W. Mont Home Health Servs., Inc.*, 16 P.3d 1042 (Mont. 2000), *cert. denied sub nom. Dow AgroSciences LLC v. Sleath*, 534 U.S. 814 (2001).

16. *Dillon v. Zeneca Corp.*, 42 P.3d 598, 601 (Ariz. Ct. App. 2002); *ISK Biotech Corp. v. Douberly*, 640 So. 2d 85, 89 (Fla. Dist. Ct. App. 1994); *Traube v. Freund*, 775 N.E.2d 212, 217 (Ill. App. Ct.), *appeal denied*, 787 N.E.2d 170 (Ill. 2002); *Moody v. Chevron Chem. Co.*, 505 N.W.2d 900, 903 (Mich. Ct. App. 1993); *M & H Enterprises v. Tri-State Delta Chems., Inc.*, 984 S.W.2d 175, 178 (Mo. Ct. App. 1998); *Warner v. American Flouride Corp.*, 616 N.Y.S.2d 534, 541 (N.Y. App. Div. 1994); *Hopkins v. Ciba-Geigy Corp.*, 432 S.E.2d 142, 146 (N.C. Ct. App. 1993); *Romah v. Hygienic Sanitation Co.*, 705 A.2d 841, 856 (Pa. Super. Ct. 1997), *aff'd without opinion*, 737 A.2d 249 (Pa. 1999); *Hughes v. Tennessee Seeds of Brownsville, Inc.*, 970 S.W.2d 471, 474 (Tenn. Ct. App. 1997). Duplicative intermediate state appellate court decisions, and there are many, have not been included in this listing. *But see Brown v. Chas. H. Lilly Co.*, 985 P.2d 846 (Or. Ct. App. 1999).

(including Texas) would all agree that Petitioners' claims here were properly held to be preempted. Petitioners' lamentations of a supposed "jurisprudential mare's nest" (*see* Pet. at 3, 12), therefore, are wildly exaggerated, if not demonstrably untrue.

F. This Court Reinforced The Automatic And Self-Executing Effect Of Express Preemption Statutes In *Medtronic*.

Citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), Petitioners argue that "this Court's *Medtronic* reasoning implies that where the federal government has not issued regulations specific to the product or claim at issue, state tort claims in the unregulated area will not be preempted." Pet. at 16.[17] Contrary to Petitioners' argument, however, this Court in *Medtronic* again emphasized that the preemptive force of § 5(b) of the 1969 Cigarette Act (like § 136v(b) of FIFRA) is automatic and self-executing. Justice Stevens' opinion specifically distinguished § 5(b) of the 1969 Cigarette Act from the preemption regime under the Medical Device Amendments of 1976 ("MDA"), where preemption is dependent upon the regulatory actions taken pursuant to the administration of that statute. Under the MDA:

> Congress explicitly delegated to the FDA the authority to exempt state regulations from the pre-emptive effect of the MDA – an authority that necessarily requires the FDA to assess the pre-emptive effect that the Act and its own regulations will have on state laws.

518 U.S. at 496 (citing 21 U.S.C. § 360k(b)). *See also id.* at 505-06 (Breyer, J.). Dispositively, there is no similar Congressional delegation of power to the EPA to exempt state law from preemption anywhere in FIFRA's statutory structure.

Comparing the MDA's preemptive regime to the express preemptive force of § 5(b) of the 1969 Cigarette Act, Justice Stevens emphasized: "Unlike the statute construed in *Cipollone* . . . pre-emption under the MDA does not arise directly as a

17. This argument overlooks this Court's settled jurisprudence in cases like *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), decided the same term as *Cipollone*. *See also United States v. Locke*, 529 U.S. 89, 115 (2000) ("It is not always a sufficient answer to a claim of pre-emption to say that state rules supplement . . . federal requirements.").

result of the enactment of the statute. . . ." 518 U.S. at 496. "The territory exclusively occupied by federal law [in *Cipollone*] was defined by the text of the statute itself." *Id.* at 489 n.9. Comparing Justice Stevens' plurality opinions in *Cipollone* and *Medtronic*, therefore, illustrates the important distinction between an automatic and self-executing preemption statute like § 136v(b) and a preemption regime tied to the timing, specificity and vigor of underlying regulatory activity.

While there are many distinctions between the MDA's regulation-dependent preemptive regime and enforcement of FIFRA's express preemption clause, California's Supreme Court summarized this primary distinction upon which a massive body of authority agrees:

> *Medtronic* is distinguishable on the ground Congress gave the federal Food and Drug Administration (FDA) a unique role in determining the scope of preemption under the MDA. . . . Congress did not give the EPA an analogous role in implementing FIFRA. (See *Oliver v. Reckitt & Colman, Inc., supra*, 12 F. Supp. 2d at p. 1291 ["[T]he Court's decision in *Medtronic* was influenced by the authority given to the FDA, an authority not given to the EPA."]; *Kuiper v. American Cyanamid Co., supra*, 960 F. Supp. at p. 1384 ["FIFRA does not have a corresponding federal regulation which limits its preemptive effect . . . . Such a regulation, along with the MDA's particular statutory language, was critical to the Court's opinion in *Medtronic*."].)

Etcheverry, 993 P.2d at 373 (brackets and second ellipsis original).[18]

18. *See also, Netland*, 284 F.3d at 899 & n.4 ("[O]ur sister circuits have concluded that the established interpretation of the FIFRA preemption clause is unchanged by . . . *Medtronic*."); *Nathan Kimmel*, 275 F.3d at 1206 (rejecting argument that *Medtronic* permitted state law cause of action for "fraud on the EPA"); *Hawkins*, 184 F.3d at 250 ("[W]e do not read [*Medtronic*] as standing for the overarching premise that tort claims fall outside 'preempted requirements.'"); *Lescs*, 1999 WL 12913, at *7 ("FIFRA preemption . . . is unchanged by *Medtronic*.") (*Lescs* contains the most thorough and elaborate circuit analysis of the reasons why the *Medtronic* plurality opinion does not change the express FIFRA preemption analysis.

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G. Petitioners' Argument That Common Law Litigation Is The Only Mechanism By Which Pesticide Efficacy Is "Regulated" Is Irrelevant And Wrong.

Petitioners misstate the facts and the law by arguing that "state law tort suits are the only legal vehicle serving to regulate the efficacy of pesticides." Pet. at 7. *See also id.* at 27 ("[N]o agency or individual is regulating the efficacy of this nation's pesticides.").[19] The gist of Petitioners' argument is that when Congress ousts all state authority from a given subject matter, it must replace that preempted state authority

(Cont'd)
See 1999 WL 12913, at *4-7); *Grenier*, 96 F.3d at 563 ("It . . . is now settled by . . . *Cipollone* and [*Medtronic*], that 'requirements' in this context presumptively includes state causes of action."); *Anderson v. Dow AgroSciences LLC*, 262 F. Supp. 2d 1280, 1287 (W.D. Okla. 2003) ("[M]ost courts which have analyzed FIFRA's preemption clause after *Medtronic* agree that the established interpretation of FIFRA's preemption clause remains unaffected.") (collecting authorities); *Lucas v. Bio-Lab, Inc.*, 108 F. Supp. 2d 518, 521 n.2 (E.D. Va. 2000); *Oliver v. Reckitt & Colman, Inc.*, 12 F. Supp. 2d 1287, 1292 (M.D. Fla. 1998); *Hawkins v. Leslie's Poolmart*, 965 F. Supp. 566, 572 (D. N.J. 1997) ("*Medtronic* did not alter the law of FIFRA preemption."), *aff'd in relevant part*, 184 F.3d 244 (3d Cir. 1999); *Kuiper v. Am. Cyanamid Co.*, 960 F. Supp. 1378, 1383-84 (E.D. Wis. 1997) ("*Medtronic* simply does not alter the Court's conclusion in this case."), *aff'd*, 131 F.3d 656 (7th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998); *Koch v. Shell Oil Co.*, 173 F.R.D. 288, 289-90 (D. Kan. 1997); *Ackerman*, 586 N.W.2d at 212-13 (*Medtronic* "does not alter the law regarding preemption"); *Eyl*, 650 N.W.2d at 753 ("[W]e have already considered the effect of *Medtronic, Inc.* on the issue of FIFRA preemption in *Ackles* and determined that FIFRA preempts failure-to-warn claims."); *Ackles*, 561 N.W.2d at 580; *Pfeiffer*, 606 N.W.2d at 776; *Lewis*, 715 A.2d at 972 (*Medtronic* "does not alter the conclusion that FIFRA preempts plaintiff's failure-to-warn claim"); *Lewis v. Am. Cyanamid Co.*, 682 A.2d 724, 729 (N.J. Super. Ct. App. Div. 1996) ("*Medtronic* is not inconsistent with *Cipollone*, . . . claims based on inadequate labeling are preempted by FIFRA."), *aff'd in relevant part*, 715 A.2d 967 (N.J. 1998); *Kawamata Farms*, 948 P.2d at 1074 (citing *Medtronic* in support of holding that "the words 'requirements' in §136v(b) presumptively includes state common law tort causes of action as well as state laws and regulations."); *Sherman v. Claire Mfg. Co.*, 657 N.Y.S.2d 453, 454 (N.Y. App. Div.), *appeal dismissed in part, denied in part*, 686 N.E.2d 1361 (N.Y. 1997); *Romah*, 705 A.2d at 851-52; *Didier v. Drexel Chem. Co.*, 938 P.2d 364, 366 (Wash. Ct. App. 1997). *But see Sleath*, 16 P.3d 1042; *Brown*, 985 P.2d 846.

19. Petitioners cite *Andrus*, 178 F.3d at 399, to support this latter statement but *Andrus*, of course, says nothing of the kind.

with a corresponding federal regulatory program in order for preemption to be complete. That clearly is not the law. *E.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992). Petitioners' argument, therefore is irrelevant under the settled jurisprudence of this Court.

Petitioners further misplace reliance on a 1978 amendment to FIFRA that, without changing a syllable of § 136v(b), permitted the EPA to selectively rather than automatically review efficacy data during the initial product registration process. Pet. at 7 (quoting 7 U.S.C. § 136a(c)(5)). From that 1978 amendment, Petitioners leap to the faulty conclusion that just because the EPA requires submission of efficacy data selectively rather than automatically during the initial registration process, it does not exercise regulatory authority over label statements concerning efficacy. To the contrary, the EPA heavily regulates efficacy issues; the discretion accorded the EPA to selectively waive the otherwise automatic and mandatory submission of such data changes only the methods of such regulation.

First, regardless of the EPA's discretionary data waiver authority during the initial registration process, pesticide registrants are nevertheless required to generate efficacy data, to balance that data with the proposed label instructions, and to hold that data ready for EPA review as it may require. 40 C.F.R. § 158.640(b)(1) (2003). If Petitioners' argument that FIFRA preemption depends upon the timing and intensity of EPA scrutiny of efficacy data were to succeed, it would have the perverse effect of forcing applicants to automatically deluge the EPA with data it neither wants nor needs in the initial registration process in order to protect themselves from that loophole in preemption.

> Such an approach would force FIFRA applicants to ensure that their disclosures to the EPA would satisfy not only the standards imposed by that agency under federal law, but also the potentially heterogeneous standards propounded by each of the 50 States. Such a holding would in turn motivate potential applicants under FIFRA to "submit a deluge of information that the [EPA]

> neither wants nor needs, resulting in additional burdens on the [EPA's] evaluation of an application." *Id.* at 351. This outcome would needlessly drain the EPA of its limited resources,
>
> . . . .

Nathan Kimmel, 275 F.3d at 1207 (quoting *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001) (alterations in original)).

Moreover, Petitioners ignore FIFRA's comprehensive post-registration data reporting requirements (7 U.S.C. § 136d(a)(2) and 40 C.F.R. Part 159), and the comprehensive regulation of efficacy issues by state administrative agencies.

> [T]here [are] two [more] fundamental flaws in the argument that pesticide efficacy will go "largely, or entirely, unregulated" if state failure-to-warn claims are preempted: (1) Although the EPA has waived the submission of efficacy data for agricultural pesticides at the time of their *initial* registration, the agency does require and review such data if efficacy-related problems develop later; and (2) California [like Texas] has a comprehensive registration and regulatory program for pesticides, and while the California Department of Pesticide Regulation may not impose its own requirements for labeling, it can restrict or prohibit the sale or use of products that it determines are inefficacious or phytotoxic.

Etcheverry, 993 P.2d at 375 (original emphasis). *See also id.* at 375-76 (describing EPA's comprehensive post-registration regulation); *id.* at 376 (describing California's state regulatory program). *Compare* TEX. AGRIC. CODE ANN. §§ 76.001-76.203 (Vernon 2003). *See also id.* at § 76.046(c)(3) (permitting the denial or cancellation of registration of a pesticide that is "detrimental to vegetation, except weeds"). In point of fact, the state regulatory programs of at least twenty-four states join Texas in *specifically* addressing and regulating efficacy issues.[20]

20. *See, e.g.*, ALA. CODE. § 2-27-2(24)(b)(4) (2003) (pesticide is "misbranded" if it harms "vegetation, except weeds, to which it is applied"); (Cont'd)

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ARIZ. REV. STAT. § 3-341(17)(b)(vi) (Michie 2003) (pesticide is "misbranded" if it is "injurious to . . . vegetation, other than the pest to which it is applied"); ARK. CODE ANN. § 2-16-402 (2003) (one purpose of the Arkansas Pesticide Control Act is to eliminate "ineffective" pesticides); CAL. CODE REGS. tit. 3, § 6186 (2003) ("Each application for registration or amendment to the labeling of a pesticide shall be accompanied by data supporting each efficacy claim."); *id.* § 6192 (reserving right to request phytotoxicity data in considering registration); COLO. REV. STAT. § 35-9-107(1)(e) (2003) (reserving right to request full description of tests and results including "efficacy and hazard data upon which the claims are based"); CONN. GEN. STAT. § 22a-49 (2003) (reserving right to request a report regarding "tests that have been made to establish the effectiveness of the product against the pest which is to be controlled"); FLA. STAT. ch. 487.025(g) (2003) (pesticide is "misbranded" if it is "injurious to . . . vegetation, except weeds, to which it is applied"); *id.* ch. 487.041 (reserving right to require "evidence of the efficacy" of pesticides); FLA. ADMIN. CODE ANN. r. 5E-2.031 (2003) (state agency may require submission of "summaries of data from pesticide efficacy studies" in registering pesticides); IND. CODE ANN. § 15-3-3.5-2(19)(b)(vii) (Michie 2003) (pesticide is "misbranded" if it is "injurious to . . . vegetation, except weeds, to which it is applied"); MD. CODE ANN., AGRIC. § 5-101(q)(8) (2002) (same); MISS. CODE ANN. § 69-23-3(bb)(viii) (2003) (same); MONT. CODE ANN. § 80-8-102(25)(b)(vii) (2002) (same); NEV. REV. STAT. ANN. § 586.180(2)(g) (Michie 2003) (same); N.Y. ENVTL. CONSERV. LAW § 33-0101(32)(g) (Consol. 2003) (same); N.Y. COMP. CODES R. & REGS. tit. 6, § 326.14(h) (2003) (reserving right to collect "product effectiveness data" for pesticides); N.C. GEN. STAT. § 143-435 (2003) (one purpose of the North Carolina Pesticide Law of 1971 is "[m]ore extensive observation, study and monitoring of the effectiveness and the use of pesticides . . . ."); *id.* § 143-460(23)(b)(7) (pesticide is "misbranded" if it is "injurious to . . . vegetation, except weeds, to which it is applied"); N.D. CENT. CODE § 19-18-2(19)(b)(10) (2003) (same); OKLA. STAT. tit. 2, § 3-81(28)(b)(7) (2003) (same); R.I. GEN. LAWS § 23-25-3 (2002) (one purpose of the Pesticide Control Act is to ensure that pesticides are not "ineffective"); S.D. CODIFIED LAWS § 38-20A-4 (Michie 2003) (secretary may request "efficacy" data from the applicant); TENN. CODE ANN. § 43-8-102(10)(G) (2003) (pesticide is "misbranded" if it is "injurious to . . . vegetation, except weeds, to which it is applied"); *id.* § 43-8-104(b); TEX. AGRIC. CODE ANN. § 76.046(c)(3) (Vernon 2003); 23 TEX. REG. 491 (board may approve any pesticide registered for structural pest control "as long as . . . efficacy has been demonstrated"); UTAH CODE ANN. § 4-14-3 (2003) (requiring submission of "any information prescribed by regulation of the department deemed necessary for the safe and effective use of the pesticide"); VT. STAT. ANN. tit. 6, § 911(15)(B)(vii) (2003) (pesticide is "misbranded" if it is "injurious to . . . vegetation, except weeds, to which it is applied"); VA. CODE ANN. § 3.1-249.27 (Michie 2003) (same); *id.* § 3.1-249.39 (Cont'd)

Therefore, as *Etcheverry* explained, the EPA heavily regulates efficacy issues; § 136a(c)(5) changes only the methods of that regulation. The states, too, heavily regulate efficacy issues through their respective regulatory and administrative agencies. Accordingly, Petitioners' argument against § 136v(b)'s express preemptive command, that an additional layer of common law tort "regulation" of pesticide efficacy is necessary to achieve FIFRA's goals, is misplaced and incorrect. *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992) ("[I]t is not enough to say that the ultimate goal of both federal and state law is the same, [a] state law is also pre-empted if it interferes with the methods by which the federal statute was designed to reach that goal.") (citations, internal quotation marks and brackets omitted). Thus, "[FIFRA] does not foreclose a state from enacting its own laws to advance the goal of [crop] safety, but it does restrict the ways in which it can do so." *Id.*

H. Petitioners' Focus On A 1978 Amendment To FIFRA Overlooks An Important Holding In *Cipollone* And FIFRA's 1988 And 1996 Amendments.

By focusing on the 1978 amendment to FIFRA, Petitioners also overlook *Cipollone's* holding that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." 505 U.S. at 520 (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)). "Plaintiff's reliance on subsequent legislative history showing an intent that common-law causes of action are not preempted is also misplaced. The plain language of § 136v(b) and its legislative history show a preemptive intent, and subsequent legislative history cannot negate that intent." *Jenkins v. Amchem Prods., Inc.*, 886 P.2d 869, 879 (Kan. 1994), *cert. denied*, 516 U.S. 820 (1995).

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(reserving right to require data on "product efficacy"); WASH. REV. CODE § 15.58.130(2)(d)(iv) (2003) (pesticide is "misbranded" if it does not contain directions, warnings, or cautionary statements necessary to protect "useful vegetation"); W. VA. CODE § 19.16A-3(27)(H) (2003) (pesticide is "misbranded" if it is "injurious to . . . vegetation to which it is applied" except weeds). The limitations of space do not permit further citation to state regulatory programs addressing efficacy issues more generally, rather than with the specificity of the cited state regulatory provisions.

Moreover, assuming subsequent Congressional action may illuminate the preemptive intent of a prior Congress, Petitioners' argument defeats itself because in concentrating on a 1978 amendment, they overlook the fact that a 1988 Congress reinforced the 1972 Congress' express preemptive command by adding the heading "Uniformity" to § 136v(b) without changing the language of the statute. *Papas I*, 926 F.2d at 1025.

> Of equal significance is the fact that Congress has remained silent in the face of *Cipollone* and its FIFRA progeny. If the interpretation of congressional purpose by so many courts were incorrect, Congress could enact corrective legislation. Its silence here – in the face of a uniform, widespread and rapidly growing wave of precedent – may be deemed a conscious acquiescence in the conclusion we and others have reached.

Hue v. Farmboy Spray Co., Inc., 896 P.2d 682, 691 (Wash. 1995) (citations omitted). Indeed, on August 3, 1996, a year after *Hue*, Congress amended and re-enacted FIFRA through the Food Quality Protection Act of 1996, and left its express preemption clause undisturbed. Congressional silence in 1996, in light of overwhelming federal and state law finding preemption since *Cipollone*, is thunderous in its effect.

I. The United States Solicitor General And The EPA Have Expressly Repudiated The Prior Anti-Preemption Arguments Made In *Etcheverry*.

Petitioners are wrong to rely upon and argue from the unsuccessful *amicus curiae* brief filed by the EPA and the Environmental and Natural Resources Division of the United States Department of Justice (not the United States Solicitor General, as Petitioners incorrectly argue, Pet. at 4, 21) before the California Supreme Court in *Etcheverry*, an abbreviated version of which was filed in *Hart v. Bayer Corp.*, 199 F.3d 239 (5th Cir. 2000), to support their argument that FIFRA does not preempt state law causes of action against herbicide

manufacturers that challenge the accuracy and sufficiency of EPA-approved product labels. *See* Pet. at 4, 11-12, 21-22.[21]

First, as Petitioners concede (Pet. at 5, 21) the United States Solicitor General has directly repudiated the EPA's former position on FIFRA preemption in its recent *amicus curiae* brief before this Court in *Am. Cyanamid Co. v. Geye*, 79 S.W.3d 21 (Tex. 2002), *cert. denied*, 123 S.Ct. 2637 (2003), stating in part:

> The United States has re-examined the position that it urged in *Etcheverry* in light of the ruling of the California Supreme Court in that case, as well as the subsequent rulings of other courts, and it has concluded that its position in *Etcheverry* that FIFRA categorically does not preempt common law tort suits or other damages actions is incorrect. In the United States' view, just as Section 136v(b) applies to requirements imposed in a law enacted by a legislature or a regulation promulgated by a state agency, it applies to requirements imposed in the form of a duty or standard of care in a tort action.

Brief for United States as *Amicus Curiae*, at 17, *Geye*, 79 S.W.3d 21 (No. 01-0008) (footnote omitted). *See also id.* at 9 ("[T]he United States submits that state-law damages claims are within the scope of Section 136v(b) where the state-created legal duty on which the suit is predicated would 'impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA].'") (second alteration in original, quoting § 136v(b)).

Unable and unwilling to deal with the United States' unequivocal endorsement of FIFRA preemption in a straightforward way, Petitioners instead suggest the EPA might not agree with the Solicitor General because its separate counsel did not sign the *Geye amicus* brief as it had done with

21. The EPA's litigation arguments in *Etcheverry* were automatically suspect because the Solicitor General took a directly contrary position in *Mortier*, telling this Court that "an *exclusively federal approach* is necessary in certain areas of pesticide regulation. *One such area is labeling.*" Brief for United States as *Amicus Curiae*, at 22, *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597 (No. 89-105) (emphasis added). Indeed, the EPA did not even acknowledge in *Etcheverry* the Solicitor General's prior emphatic support for preemption in *Mortier*.

the earlier *Etcheverry amicus* brief. Pet. at 21-22. Not only is this suggestion preposterous, it is factually erroneous. On October 6, 2003, the EPA issued a press release specifically endorsing and agreeing with the Solicitor General's *Geye amicus*:

> [FIFRA] preempts States from imposing any requirements for labeling or packaging that are in addition to or different from Federal law. Accordingly, crop damage lawsuits that impose label requirements that are different from the Federal label requirements are preempted. The Federal government took this position in a brief to the United States Supreme Court. The overwhelming majority of courts that have considered this issue agree with this legal interpretation.
>
> EPA has a comprehensive regulatory program for pesticides, and in particular has extensive requirements for national product labeling. Every pesticide product sold in the United States must bear an EPA-approved label containing cautions and use directions to ensure its safe and effective use. The Agency's position on preemption is consistent with the longstanding health and safety requirements imposed by the Federal pesticide laws. It also reaffirms the longstanding position that FIFRA, which establishes a stringent national regulatory program, is the guiding and preeminent regulatory system.

Press Release, Environmental Protection Agency (Oct. 6, 2003) (quoted in part in Mary Beth Polley, *EPA: FIFRA Preempts Labeling-Related Tort Lawsuits*, 31 PESTICIDE & TOXIC CHEM. NEWS 20 (Oct. 13, 2003)).

J. Petitioners Either Flatly Misstate The Law Or Grossly Exaggerate Their Arguments That A Conflict In Lower Court Authority Exists Requiring Resolution By This Court.

1. Petitioners misstate the law by arguing that the D.C. Circuit's obsolete and repudiated *Ferebee* decision represents an inter-circuit conflict.

Petitioners misstate the law by arguing that the District of Columbia Circuit's obsolete decision in *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir. 1984), demonstrates a conflict between that Circuit and its nine sister Circuits that, since *Cipollone*, have enforced FIFRA's express preemption clause. *See* Pet. at 3 n.1; 13; 19-20. *Ferebee* was discussed in *Cipollone* itself (505 U.S. at 536-37), but a majority of the Court rejected *Ferebee*'s anti-preemption thesis, holding it to be "at odds with the plain words of the 1969 Act and with the general understanding of common-law damages actions." 505 U.S. at 521 (plurality opinion); *id.* at 548-49 (Scalia, J.). Petitioners' discussion of *Ferebee* collides directly with *Cipollone*'s majority and the massive weight of post-*Cipollone* authority:

> *Ferebee*'s fundamental thesis – that liability under state law for failure to warn is not a requirement for labeling or packaging different from that required under FIFRA – has been rejected by the federal courts since *Cipollone* as "sophistry" and "silly," and the attempted distinction has been characterized as "illusory."

Etcheverry, 993 P.2d at 371-72 (collecting authorities, internal citation omitted).

Petitioners compound their error by stating that "[t]he *Ferebee* opinion has never been revisited by the [D.C. Circuit] court, . . ." Pet. at 20. This is simply not true.

> Although the District of Columbia Circuit has not expressly overruled *Ferebee*, it has expressly acknowledged that *Cipollone* repudiated its central premise by "explaining that damage actions can be used to enforce state regulations as effectively as other forms of preventive relief and thus damage actions must be preempted where positive enactments are preempted . . . ." (*Waterview Management Co. v. F.D.I.C.* (D.C. Cir. 1997) 105 F.3d 696, 699 [summarizing *Cipollone's* holding]).

Etcheverry, 993 P.2d at 372 (alterations original).

2. Petitioners misstate the law by arguing that a conflict has arisen between the state and federal courts in New York since this Court's *Medtronic* decision.

Petitioners also flatly misstate the law when they argue that a conflict between the state and federal courts in New York has emerged because of *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996). *See* Pet. at 19-21; *id.* at 27 (citing *Tyler v. Dow Chem. Co., Inc.*, 683 N.Y.S.2d 619 (N.Y. App. Div. 1998), and *Mann v. H.W. Anderson Prods., Inc.*, 676 N.Y.S.2d 658 (N.Y. App. Div. 1998)).

First, neither the *Tyler* nor *Mann* court even mentioned *Medtronic*. Second, the *Tyler* court expressly held that "plaintiffs' allegations concerning the failure to provide additional or different warnings than those contained on the label are preempted by FIFRA." 683 N.Y.S.2d at 621 (citation omitted). Similarly, the *Mann* court agreed that product manufacturers are entitled to FIFRA preemption, but held that Anderson, the employer of plaintiff's mother, had no standing to assert that defense under the specific facts alleged. *See* 676 N.Y.S.2d at 660 ("The complaint in *Warner* was directed solely at the manufacturers, who relied successfully on the FIFRA labeling preemption. Although Union Carbide [the manufacturer] fits fully within the *Warner* holding and the FIFRA labeling preemption, we conclude, for the reasons that follow, that Anderson does not."). Third, New York's state courts have expressly *rejected* the notion that *Medtronic* alters the FIFRA preemption analysis. *Sherman v. Claire Mfg. Co.*, 657 N.Y.S.2d 453, 454 (N.Y. App. Div.) (FIFRA precedent "not inconsistent with . . . *Medtronic*"), *appeal dismissed in part, denied in part*, 686 N.E.2d 1361 (N.Y. 1997). *See also Ell v. S.E.T. Landscape Design, Inc.*, 729 N.Y.S.2d 515, 517 (N.Y. App. Div. 2001).

Petitioners' argument that a conflict has emerged between the federal and state courts in New York since *Medtronic*, therefore, is simply false. *Compare Williams v. Dow Chem. Co.*,

255 F. Supp. 2d 219, 228 (S.D.N.Y. 2003) ("Defendants convincingly argue that common law tort claims based on 'fraudulent omission,' 'fraudulent concealment' or 'failure to warn' are preempted by FIFRA.") *with Tyler*, 683 N.Y.S.2d at 621, *and Ell*, 729 N.Y.S.2d at 517.

3. Petitioners cannot rely on the Arkansas Supreme Court's obsolete decision in *Alter* to support their "conflict" argument.

Petitioners cannot rely on the Arkansas Supreme Court decision in *Ciba-Geigy Corp. v. Alter*, 834 S.W.2d 136 (Ark. 1992), to bolster their exaggerated claims of conflict. *See* Pet. at 6, 21. The Arkansas Supreme Court in *Alter* relied on *Ferebee's* holdings and delivered its decision a scant twenty-eight days before this Court issued its seminal decision in *Cipollone*, in which a majority of this Court, as demonstrated above, flatly rejected *Ferebee's* anti-preemption thesis. There is every reason to believe, therefore, that the Arkansas Supreme Court is ready to revisit its *Alter* decision in light of *Cipollone* and its FIFRA-related progeny. *See Goforth v. Smith*, 991 S.W.2d 579, 584 (Ark. 1999) ("In *Cipollone* . . . the Supreme Court wrote '[A]t least since *Erie R. Co. v. Tompkins* . . . we have recognized the phrase 'state law' to include common law as well as statutes and regulations.'") (original brackets).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

DEAN T. BARNHARD
Counsel of Record
BARNES & THORNBURG
11 South Meridian Street
Indianapolis, Indiana 46204
(317) 236-1313

JOSEPH R. ALBERTS
DOW AGROSCIENCES LLC
9330 Zionsville Road
Building 308-1B
Indianapolis, Indiana 46268
(317) 337-4837

Attorneys for Respondent